1986

# Phyllis E. Colman v. William J. Colman : Brief of Appellant

Utah Court of Appeals


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DOCKET NO. 860325

SUPREME COURT

STATE OF UTAH

PHYLLIS E. COLMAN

Plaintiff-Respondent

vs.

WILLIAM J. COLMAN

Defendant-Appellant

No. 19835

# APPEAL BRIEF OF DEFENDANT-APPELLANT

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## Authorities

In this brief, Defendant-Appellant will be called "Defendant", Plaintiff-Respondent will be called "Plaintiff". "R" stands for Record.

## NATURE OF THE CASE

In connection with their 1977 divorce, the parties made the property settlement agreement (the "Agreement") attached to the Complaint. During most of the 24 years of marriage, Defendant had been President of Owanah Oil Corporation ("Owanah"). At divorce time, Defendant had control over valuable assets (principally stock in Western Oil Shale Corporation, Cayman Corporation and Royalty Investment Company issued in various names including Defendant's) much of which he claimed to belong to Owanah and not to be marital estate. When the Agreement was signed, questions about what stock was marital estate and what stock was Owanah's had not been resolved. The Agreement provided that Defendant would, within one year, furnish an accounting with respect to that ownership. The Complaint alleges Defendant failed to furnish the accounting, seeks to compel it, and further seeks such damages as the Court finds appropriate after the allegedly delinquent accounting is made. Defendant claims to have made the accounting and thereafter to have acted in reasonable reliance on express or implied representations it was satisfactory.

## DISPOSITION BELOW

The trial court held it didn't matter which property

was Owanah's and which was Defendant's because Owanah was Defendant's alter ego, so all the assets which were to be the subject of an accounting under the Agreement were marital estate. Since Owanah had converted most of its assets into cash and used the cash in its business operations after the divorce, the trial court ordered Defendant to pay Plaintiff one half the amount realized from the sales. Defendant is further ordered to pay Plaintiff a percentage of the amount realized by Royalty Investment Company when Royalty sold certain real property. As of the date of judgment, the total ordered to be paid was $339,159.00. The trial court allowed no set-off for stock represented by certificates held by Plaintiff's attorneys for some time after the divorce and eventually delivered to Plaintiff without Defendant's consent. The trial court made no disposition of Defendant's counterclaim.

## RELIEF SOUGHT ON APPEAL

Defendant asks that the judgment appealed from be reversed and the cause remanded with instructions (1) that the accounting given by Defendant at the trial be recognized as controlling, (2) that division of marital estate as established by that accounting be ordered, and (3) that Plaintiff be ordered to properly account for the proceeds of the sale of real property as the Agreement requires and the counterclaim demands.

## STATEMENT OF FACTS

Because the trial court based its judgment on a finding

that Owanah is merely Defendant's alter ego, it is of primary importance that the Court be aware of undisputed evidence about Owanah. We will first review that evidence. Secondly, we will identify the evidence that Plaintiff has received all the benefits contemplated for her by the Agreement which her Complaint seeks to enforce.

A. The Nature of Owanah

Owanah is a corporation which began operations in 1952 to engage in oil and gas exploration (R.685). The principals were Francois de Gunzberg and Defendant (R.687). In 1959, the corporation was restructured to generate capital from outsiders. Each of the principals contributed $300.00 and had his 300 previously issued shares "reissued" to him (R.687). Of the 300 shares to which Defendant was entitled under this reorganization plan, 150 were issued to him (Ex. D.27, R.686) and 150 to Plaintiff (R.686). At that time, 600 additional shares were issued to seven members of de Gunzberg's family (R.688). The new stockholders purchased units at $500.00 per unit. Each unit was comprised of one share of stock at $100.00 and one $400.00 debenture (R.688,9). The restructured corporation began life, consequently, with $300,600.00 of which Defendant had contributed $300.00. Subsequently, Defendant's brother, R.J. Colman, bought 121 shares at $100.00 per share, and Defendant's sister, Marian Collins, bought 143 shares at $100.00 per share (R.694). On the Agreement's date, then, there were 1444 Owanah shares outstanding held by 12 stock-

holders. Plaintiff and Defendant together held approximately 20% of those shares for which they had contributed less than one-tenth of one percent of Owanah's capital.

Owanah is now engaged in a sodium brine development project located at the Carson Sink near Fallon, Nevada (R.689), leasing the land from the Southern Pacific Railroad (R.690). Owanah has spent in excess of $1 million dollars on that project (R.742). Of the money generated from the sale of stock which Plaintiff claims were part of the marital estate, every dollar has been deposited in Owanah's account or the account of an Owanah subsidiary (Ex. D-34 covering 5 transactions in Cayman Corporation stock; Ex. D-40 covering 2 transactions in Western Oil Shale Corporation stock[1]). Defendant also mortgaged his Park City residence for $60,000.00, applied part of the proceeds to the reduction of Owanah's debt, and deposited the remainder in Owanah's account (R.38,39). Payments against the mortgage debt have since been made out of Owanah funds (Ex. P-47, sheet 5, R.804). Except for those mortgage payments, the total amount paid to or for defendant out of Owanah funds has been minimal, amounting in the period from November 23, 1981 through November 26, 1982, for example,

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1. These exhibits consist of brokers' confirmations that sales of Cayman or Wosco stock were made for Defendant's or Owanah's accounts. Attached to each confirmation is a bank deposit slip showing the exact amount of the sale proceeds was deposited to Owanah's account. The confirmations were produced by Plaintiff, the deposit slips by Defendant.

to $22,695.25 (Ex. P-47, R.773). No other salary or expense reimbursement payments were revealed by Plaintiff's review of cancelled checks.

B. Defendant's manner of conducting Owanah's business.

Defendant began borrowing money from First Security Bank (the "Bank") for the conduct of Owanah's business in about 1952 (R.690). At the beginning, he made application for loans personally because Owanah's net worth was so small the Banks preferred to deal with Owanah's principals personally (R.690), and because adjustments in personal loans could be made without the time consuming formality of corporate resolutions (R.692). Defendant continued that practice even after Owanah had substantial assets, and he would list on the financial statement as "his" property anything in which either he or Owanah had an interest (R.693). The Bank was aware that the loans were for Owanah's use because the loan proceeds were deposited in Owanah's account (Defendant's testimony at R.692, coroborated by the Bank's Mr. Hansen at R.499-500).

Defendant similarly avoided taking stock and leases in Owanah's name, even though the acquisitions were with Owanah's funds, including the $325,000 contributed by outside shareholders in 1959, because brokers and purchasers required corporate resolutions supporting sales (R.692), and resolutions would entail signatures of people living in Massachusetts and France. Defendant nevertheless scrupulously deposited all income from sales of property he recognized as Owanah's - even

though held in his name or street name - in Owanah's bank accounts (Ex. P-34, Ex. P-40). Plaintiff's attorneys reviewed bank statements and cancelled checks for Owanah accounts for several years (R.790) and found only the checks itemized on Exhibit 47 as evidencing payments to or for Defendant as distinguished from checks made for clearly corporate purposes. The Exhibit 47 checks are the only evidence of salary or expense reimbursement paid to Defendant for acting as president of Owanah.

C. The Agreement

The parties were divorced in 1977 after 24 years of childless marriage during which Defendant was the source of Plaintiff's support (Agreement, R.7, ¶8). Putting aside questions about which securities under Defendant's control were a part of the marital estate and which were not, the Agreement's property settlement strongly favors Plaintiff in that:

(a) Of three homes acquired by the parties during marriage (one on Walker's Lane in Salt Lake and two in Edgartown) she was given two as well as half the proceeds from her sale of the third (Agreement, R.13, ¶s 1, 10, 12).

(b) She was given all stock held in her name (Agreement, R.13 ¶7) including 150 shares of Owanah (R.479).

(c) She was given the parties entire interest in a

building lot in Edgartown (R.15 ¶18).

(d) She was given one-half of all other realty in which the parties were known to have an interest (Agreement, R.13-16).

(e) She was given one-half of any stock owned by Defendant (R.13 ¶7) and, in the event any of that stock was pledged to secure "any personal or corporate loan", he was obligated to pay off the indebtedness (R.14).

(f) Despite having been given more than half the agreed marital estate, she was given alimony of $500.00 per month (R.7 ¶8)

D. The Accounting.

Within one year after the Agreement, Defendant did furnish an accounting as the Agreement requires by making the same explanation to Roe & Fowler about the source of funds for acquisition of the stock and other property as he made to the Court during trial (R.553, R.743,744). He made the explanation to Paul Landis of the Roe-Fowler firm, and made the kind of record Mr. Landis thought appropriate (R.469). In connection with the accounting and at the time of the divorce, all the certificates then in the parties' safety deposit box were taken out of the box, delivered into the custody of Roe & Fowler and kept by Roe & Fowler for implementation of the terms of the Agreement (R.743).

On August 27, 1978, shortly after the year within which Defendant was required to account, Roe & Fowler released some

of the certificates in its custody to Defendant. To document the release, Roe & Fowler prepared a "Receipt" for Owanah's signature, not Defendant's (R.47,48, R.745, Ex.P-8). That receipt declares that the shares released are "owned by Owanah." An original is retained by Roe & Fowler (Ex. P-22). Between August 27, 1978 (when Roe & Fowler released certificates to Owanah) and May 29, 1980, (when the Complaint was filed), Plaintiff made no demand on Defendant for further accounting and in no way indicated dissatisfaction with the accounting provided (R.781).

E. What the accounting shows about ownership of disputed property.

The dispute is over the ownership of Cayman Corporation stock, Western Oil Shale Corporation stock, and real property in Cache County known as the "Anderson Ranch."

Western Oil Shale Corporation ("WOSCO") Stock

The Wosco stock was issued in about 1964 in consideration of Owanah's transfer to Wosco of Owanah's interest in oil shale leases for which Owanah paid the filing fees and rentals (R.743). The shares were issued, at Owanah's request, in various names other than Owanah's so Owanah could more easily sell or otherwise deal with it. (R.692). Defendant claimed ten percent of 22,560 shares so issued, or 2,256 shares, as his compensation from Owanah for making the deal (R.745). He admits Plaintiff is entitled to half of that 2,256 shares. No part of the funds expended to acquire or maintain

the leases transferred to Wosco came from the parties' personal accounts.

Cayman Corporation ("Cayman") Stock

The Cayman stock was issued by Cayman as consideration for the transfer to Cayman of all outstanding shares in National Oil Shale Corporation (R.698). The National Oil Shale shares had previously been issued to its stockholders as consideration for the transfer to National Oil Shale of oil shale leases which had been acquired by Owanah and Max Lewis (R.703), and an oil and gas lease with a producing oil well which had been paid for by James Menor, Dale Coenan, and R.J. Colman (R.704). The oil shale lease rentals had been paid by Owanah (R.701, 702, Ex.D-30, Ex.D-31). When National Oil Shale certificates were issued, all those representing consideration for the oil and gas lease, 1500 shares, were issued to Defendant, but he took them as trustee for Menor, Coenan and R.J. Colman (R.700), and he satisfied his fiduciary obligation to the beneficiaries (R.705). The National shares issued as consideration for the oil shale leases were issued to Max Lewis and his family members and to Defendant (R.700, Ex.D-28). The shares were issued to Defendant rather than to Owanah for the same reason Owanah took most of its assets in officers or street name. When Cayman shares were issued in exchange for National shares, the Cayman certificates were issued to the persons named on the National certificates submitted for exchange.

Anderson Ranch

The Anderson Ranch was never owned by either Owanah or Defendant, it was owned by Royalty Investment Company ("Royalty"). Royalty was formed as a corporation in 1958 (R.774). It acquired a contract to purchase the Anderson Ranch in about 1962 (R.775) some 15 years before Defendant became an officer and director (R.774). The installment payments on the Ranch were made by R.J. Colman, M.G. Collins and Owanah (R.775). As a result of their having made those payments and having assigned royalties to Royalty (R.601), R.J. Colman, M.G. Collins and Owanah became entitled to 62-1/2 percent of the outstanding stock in Royalty (R.727-30). None of the money for making installment payments came from Defendant's personal funds (R.776).

In January 1982, Royalty sold the Anderson Ranch for $250,000.00 and authorized the proceeds to be utilized by Owanah in the Carson Sink development (Ex. P-48, R.832), Royalty having an option to demand the return of its money plus interest or take a 4% overriding royalty interest in product from the project (Ex.P-48). The trial court ordered Defendant to pay Plaintiff a sum equal to one-half of 62 1/2% of the amount Royalty realized from the sale of the Ranch.

## ARGUMENT

### POINT I

"ALTER EGO" WAS NOT AN ISSUE FRAMED BY THE PLEADINGS OR OTHERWISE PROPERLY BEFORE THE TRIAL COURT FOR RESOLUTION, AND THE TRIAL COURT COMMITTED ERROR IN BASING ITS DECISION ON AN ALTER EGO LEGAL THEORY.

The entire foundation of the judgment in this case was the trial court's finding that "the corporation is merely Defendant's alter ego, and the assets claimed to be owned by Owanah Oil Corporation are in fact owned by Defendant" (Finding No. 14, R.371; memorandum decision R.266). No alter ego issue was, we submit, raised by the pleadings or tried by express or implied consent of Defendant.

The Complaint in this matter alleges that Defendant failed to furnish to Plaintiff an "accounting of stocks owned by him or in which he has any interest", and seeks to compel one. It is noteworthy that the evidence indicates no question about the identity of the stocks to which the accounting would relate. The stock was represented by certificates some of which were delivered to and kept by Roe & Fowler and the remainder of which were held by the Bank as security for a loan. Defendant's testimony is undisputed that he delivered all the certificates from the parties' safety deposit box to Roe & Fowler and told Roe & Fowler about the pledged securities. The Agreement itself recognizes that certain stocks "owned by" Defendant might have been collateralized for "personal and corporate loans." If any of that loan collateral

is Defendant's stock, the Agreement says, the payment of the loan will be Defendant's responsibility, and Plaintiff will get her half free of the loan burden. That provision is consistent only with an understanding that the loans were really corporate obligations, should have been secured only by corporate property, and that Defendant's stock was marital estate free from such obligation.

The case presumably went to trial on the issue framed by the pleadings: Had Defendant furnished an adequate ccounting identifying which of the stocks in Roe & Fowler and Bank custody at the time of the Agreement belonged in the marital estate and which did not? The expectation was that, if Judge Dee concluded the accounting was not adequate, he would order a more painstaking or better verified accounting and defer any ruling on damages until an accounting to his specifications was made. In the course of trial, Defendant testified about the accounting he had furnished, explaining to the Court as he had to Plaintiff's lawyers that most of the property in question had been acquired in the course of Owanah's operation using capital contributed by outside investor stockholders. His testimony was corroborated by the evidence that all proceeds from sale of any stock by Defendant or Owanah had been deposited in Owanah's account and used for Owanah's purposes. The only contrary evidence was that he had listed the stocks and other property on his financial statements as his property when borrowing money which everyone knew was for Owanah's

purposes and which was deposited in Owanah's account. The Court found that, even assuming everything Defendant said was true, all the property in question was still marital estate because Owanah is merely Defendant's alter ego.

The pleadings do not frame an alter ego issue. It is not alleged that there is such "unity of interest and ownership" with respect to the property in dispute that the separate identities of Defendant and Owanah should be ignored. It is not alleged (nor does the evidence show) that Plaintiff believed or relied on representations that the stock in question was all Defendant's and none Owanah's so that gross inequity would result from recognizing the separate identities of Owanah and Defendant. At no point in the course of trial did Plaintiff's counsel use the phrase "alter ego". Interrogation of Defendant at trial and before was always directed toward eliciting from Defendant an explanation of his justification for listing as his property assets he really believed to be Owanah's, and to lead him to say something which could be construed as an admission against interest. Nothing about the interrogation put Defendant on notice that an alter ego theory would suddenly be expressed after the parties rested and the trial was concluded.

While Rule 15 is liberally construed to free litigants from legalistic restrictions in the presentation of their causes, it does not justify the introduction of new theories of action after the evidence is in. In Mitchell v Palmer, 240

P.2d 970, 1210 245 (1952), the Plaintiff undertook to set aside certain deeds on the grounds of fraud in inducing their execution. At trial, Plaintiff attempted to adduce evidence of non-delivery. This Court held the Plaintiff was properly held to the legal theory expressed in her Complaint.

A number of federal cases have held that implied consent to the trial of an unpleaded issue will not be inferred merely because evidence relevant to the unpleaded issue, as well as an issue framed by the pleadings, was introduced without objection. An unpleaded issue is not tried by implied consent unless it is obvious from the evidence being offered that the offering party intends to raise a new issue. In MBI Motor Co. v Lotus/East, CA Tenn 1974, 506 F.2d 709, the Court said it must "appear that the parties understood the evidence" relating to the unpleaded issue "was aimed at the unpleaded issue." This is not the case when the evidence in question is also relevant to pleaded issues. Avco Corp. v Am. Tel & Tel, DC Ohio 1975, 68 FRD 532, Wirtz v FM Sloan, DC Pa 1968, 285 F.Supp. 669, aff. 411 F.2d 56.

In two recent cases, Pohl Const. Co. v Marshall, CA 10 1981, 640 F.2d 266, and Cioffi v Morris, CA Fla 1982, 678 F.2d 539, the federal courts have ruled that implied consent will not be found if the Defendant could have offered additional evidence had he been aware of the unpleaded theory. In this case, Defendant could have adduced evidence that Plaintiff was always aware that most of the stock in question was acquired

with Owanah assets including the capital of outside investors and that Plaintiff did not regard it as marital estate. Defendant was unable to do so because Plaintiff was not present at the trial. Defendant would not have waived her attendance if he had been aware that judgment would be sought on any previously unexpressed legal theory.

POINT II

EVEN IF ALTER EGO HAD BEEN PUT IN ISSUE, THE EVIDENCE CANNOT SUSTAIN THE FINDING MADE BY THE TRIAL COURT.

This Court has, in recent years, considered three cases in which alter ego was the basis of trial court judgment, Dockstader v Walker, 29 U.2d 370, 510 P.2d 526, 1973; Norman v Murray First Thrift, 508 P.2d 1028, Utah 1975; and Centurian Corp. v Fiberchem Inc., 562 P.2d 1252, Utah 1977. In each of those cases, a trial court judgment based on alter ego findings was reversed, or a trial court refusal to apply alter ego was affirmed.

The circumstances which must co-exist to justify application of the alter ego doctrine are best stated in Norman. Using language which recurs in cases from many jurisdictions,[2] this Court there said:

> To disregard the corporate entity, there must be a concurrence of two circumstances: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist...and (2) the observance of the corporate

2. Cases discussing alter ego concepts are digested in the West System under Corporations Key 1.4. There are hundreds digested in the Ninth Dicennial alone. Norman well capsulizes their teaching.

> form would sanction a fraud, promote injustice, or an unequitable result would follow.

A. Is there unity of ownership in this case?

For the most part, unity of ownership and interest is found only where all, or practically all, of the stock in the corporation is owned by the individual. In Dockstader, this Court observed that the alter ego doctrine is generally applied where the corporation is a "one man corporation in the sense that the individual owns all or practically all" of the stock. In that situation, there is, of course, "unity of ownership and interest" since there is no third party who can assert a right to share in the profits of corporate enterprise or the proceeds from liquidation of corporate property on dissolution. The unity of interest requirement has occasionally been satisfied by a showing that third party stockholders hold stock under fiduciary obligation to the dominant stockholder. We find no cases, however, upholding a unity of ownership finding where the individual owns a small minority of the outstanding shares, and the third parties holding the majority of the shares contributed most of the corporate capital. In this case, Defendant owns about ten percent of Owanah's shares, and the majority shareholders contributed 99% of the corporate capital. By finding unity of ownership and interest as between Owanah and Defendant in this case, the trial court ruled as a matter of law that Owanah's majority shareholders had no interest or ownership in the property acquired with their capital.

B. Where are the equities?

A great many cases emphasize that the mere fact that the individual owns all the stock (Ramsey v Adams, 603 P.2d 1025, 4 Kan App 2d 662, 1979) or is the dominant influence in forming corporate policy (Goetz v Goetz, 567 SW 2d 892, Tex 1978) does not, by itself, justify disregarding the corporate entity. There is nothing illegal or contrary to public policy about a corporation's being a one man operation. It is only when the individual uses the corporation to achieve an illegal or fraudulent objective that courts will undertake to pierce the corporate veil.

Norman speaks in general terms of the alter ego doctrine's purpose to promote equity. The cases which treat specifics almost universally require a plaintiff to prove the elements of fraud. In Roderick Timber Co. v Willopa Harbor Cedar Products, 627 P.2d 1352, 29 Wash App 311 (1981), the court declared that the separate identity of the corporation will be honored "unless its recognition serves to perpetrate some form of injustice, which typically involves fraud, misrepresentation, or manipulation to a creditor's detriment." In Centurion Corp, (supra), this Court characterized what a plaintiff must prove as "something akin to fraud."

While the evidence in this case may show that Defendant misrepresented his assets to the Bank, it certainly does not show any misrepresentation to Plaintiff. There is no evidence

that she ever saw any financial statement submitted with an Owanah loan application. She neither alleged nor testified that Defendant ever represented to her that all the stock in dispute was his and none Owanah's. She neither alleged nor testified that Defendant ever spent any of the parties' money to acquire Cayman or Wosco stock, to acquire royalty interests, or to make Anderson Ranch payments. She has provided no evidentiary basis for her contention that her claim to the assets in controversy is superior to the claims of the other Owanah shareholders who contributed so much more to corporate capital than she did.

The evidence does not show any manipulation of corporate assets resulting in Defendant's enrichment or self aggrandizement. On the contrary, Defendant has utilized all proceeds from corporate property sales in attempting to realize corporate objectives, and Owanah's success will benefit Plaintiff, who holds more Owanah shares than Defendant, more than it will benefit Defendant. He has been paid minimally for managing the corporation. It is inconceivable that, had Defendant considered the assets which were sold to have been his personal property, he would have deposited all the sales proceeds in Owanah's account.

It is difficult to perceive the injustice which will result if the corporate identity is honored in this case. Plaintiff will have received, even if the judgment is reversed, her support during 24 years of marriage, a house on Walker's

Lane in Salt Lake, a house in Edgartown, a building lot in Edgartown, half of all real and personal property Defendant, as distinguished from Owanah, owned, and $500.00 per month in alimony.

It is not difficult to perceive, however, the injustice which will result from this Court's sustaining the trial court's judgment. Defendant has risked all his assets, as well as Owanah's, on the Carson Sink project. He even mortgaged his house in Park City to keep Owanah solvent. The one asset on which Plaintiff can presumably execute is the Carson Sink plant, in which the trial court has declared Owanah's stockholders other than the parties have no interest. Plaintiff, who has made no investment at all in Owanah or the project, will then take, under what was ostensibly a divorce decree, everything of value which has derived from the investment by others of more than $300,000.00. She will have achieved that goal, moreover, in an action to which Owanah was never named as a party, and in which the investors were never served. The investors had no reason to suppose their investment was in jeopardy and no chance to defend it.

The trial court in effect held that, when a loan applicant files a financial statement with a bank, he guarantees the accuracy of the statement to all the world. Moreover, any property represented to be the applicant's on his statement becomes his as a matter of law without regard to what the public records may show and without regard to the equities

of third parties.

## POINT III

### BY APPLYING ALTER EGO, THE TRIAL COURT HAS CONSTRUED THE AGREEMENT TO EFFECT A PROPERTY DISTRIBUTION OUT OF HARMONY WITH THE PARTIES' INTENT.

The Complaint in this action prays for (1) an order compelling Defendant to account, and (2) for such damages as the accounting shows Plaintiff to have sustained. The fundamental judicial concern, consequently, is to assure that the "equitable" distribution of their property which the Agreement contemplates is achieved. By applying alter ego doctrine here, the trial court has construed the agreement to achieve a distribution which could never have been intended by Defendant, and which is much more favorable to Plaintiff than she, on the evidence, could rationally have expected.

It is simply beyond credit that Defendant would voluntarily have consented to the division of property which occurs if the corporate entity is disregarded. Even if the corporate entity is honored, Plaintiff received, under the Agreement, significantly more than half of the property which is unquestionably marital estate, and she is awarded $500.00 per month alimony. If the corporate entity is ignored, she receives in addition one half of all property acquired by Owanah in the utilization of outside investor capital in some 15 years of operation. Not only does she realize that bonanza, she realizes it free of obligation to pay any of the debt which corporate property had been pledged to secure.

It is clear from the language of the Agreement and Plaintiff's subsequent conduct that she anticipated no such cut of Owanah's assets. The Agreement recognizes that there is corporate debt and stock pledged to secure it.[3] If any of that stock is shown by Defendant's accounting to be Defendant's personal property, says the Agreement, Defendant will assume the responsibility of freeing it. Such provisions are consistent only with the parties' understanding that, as between them, it was not fair for marital estate property to be pledged for corporate debt.

Finally, there is the convincing evidence of Exhibit P-8 that, within the time frame contemplated by the Agreement for accounting, Plaintiff acknowledged that stock held by Roe & Fowler was corporate property. Throughout the period of attempted implementation of the accounting provisions of the Agreement, Plaintiff demonstrated her recognition that there is an Owanah, that its property is to be differentiated from Defendant's, and that Defendant's responsibility is only to establish the basis for differentiation.

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3. The Agreement was prepared by Plaintiff's attorneys. Defendant was never represented by counsel. Consequently this instrument should be construed, everything else being equal, most favorably to Defendant.

## POINT IV

### PLAINTIFF IS ESTOPPED TO DENY THAT DEFENDANT FURNISHED AN ADEQUATE ACCOUNTING SATISFACTORY TO HER

A. Review of facts relating to estoppel

Defendant testified that, within the year the Agreement gives him for furnishing an accounting, he met with Paul Landis of Roe & Fowler, gave him the same information and documentation about property ownership as he gave the court at trial, and left with the understanding that Roe & Fowler, at least, were satisfied with his identification of marital estate property and his explanation for categorizing all other property of concern as Ownah's. On August 27, 1978, approximately a month after the year had expired, Owanah asked Roe & Fowler to release some of the certificates held by that firm as having been established to be Owanah's property. In the interim between the Defendant's meeting with Mr. Landis and the August 27 request, there was adequate time for Plaintiff to have been apprised of the accounting and express any dissatisfaction.

Roe & Fowler did not, in writing or otherwise, dispute Owanah's right to the certificates sought to be released. The certificates were released to Owanah and their receipt was documented by an instrument prepared by Roe & Fowler which declares the released stock to belong to Owanah.

That conduct by Plaintiff, through her lawyers, has implications beyond the context of the release transaction.

Roe & Fowler held the certificates to assure that, when the accounting was furnished, there would be certificates readily available for delivery to Plaintiff. The release of any of those certificates would make no sense unless Plaintiff was satisfied that the remaining certificates covered what she was entitled to receive as marital estate.

It is undisputed that Plaintiff's attorneys were fully aware of the stock held by the Bank and that, however it was listed on Defendant's financial statements, it was pledged for personal and corporate debt. It is unconceivable that she could have believed Owanah would not continue to use the pledged assets as it always had unless she raised some objection to the accounting. Owanah in fact paid the secured debt, sold much of the stock, and spent the proceeds on the Carson Sink development. It is of critical significance, we submit, that all of the utilization of Wosco and Cayman stock by Defendant for Owanah occurred contemporaneously with Defendant's furnishing an accounting to Roe & Fowler and obtaining a release of part of the stock escrowed with them. Defendant proceeded on the assumption that his accounting was satisfactory, and that Owanah was justified in using the property now claimed by Plaintiff for Owanah's business purposes. One wonders what else Plaintiff or her attorneys expected when they released Owanah stock. Moreover, for <u>two years</u> after the accounting was due under the Agreement (and <u>was furnished</u> according to the undisputed evidence) and almost two

years after Plaintiff, by releasing escrowed stock, implied her concurrence in the accounting, Plaintiff did nothing to suggest that she disputed Defendant's identification of marital estate. She made no demand for additional documentation, and she certainly gave no indication of her present contention that no accounting at all had been furnished.

B. Application of estoppel doctrine to facts

The concept of estoppel in pais is that one should not "be permitted to speak against his own acts, representations of commitments to the injury of one to whom they were directed and who reasonably relied thereon" (28 AmJur 2d 629, Estoppel §28).

This Court has had frequent occasion to comment on the doctrine and identify its elements. The most concise and comprehensive statement is the following from Morgan v Board of State Lands, 549 P.2d 695, 1976:

> Estoppel arises when a party by his actions, represensentations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence, induces another to believe certain facts to exist and that such other, acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer injustice if former is permitted to deny existence of such facts.

The Washington Court explains the doctrine in language which more precisely applies to the circumstances of this case.

> Equitable estoppel may arise where there exists a statement or act inconsistent with a later asserted claim, an action by the relying party on the faith of such statement or act and resulting injury to the relying party if the party making the representation were permitted to contradict or repudiate the statement or act. City of Mercer Island v Steinmann, 513 P.2d 80, 9 Wash.App. 479.

The elements of estoppel are (1) representation and (2) reasonable reliance resulting in detriment.

The Representation

It is well settled that the representation giving rise to estoppel need not be express; it may be inferred from the positive conduct or silence of the party against whom it is asserted. Morgan v Board of State Lands, (supra); Grover v Garn, 23 U.2d 441, 464 P.2d 598, 1970. In this case, the evidence shows both affirmative conduct inconsistent with Plaintiff's present claim and silence in the face of an obligation to speak.

Plaintiff's claim as expressed in her complaint is that Defendant failed to furnish an accounting. As expressed in her post trial memorandum for the first time, Plaintiff's claim is that there is no Owanah, Owanah being only Defendant's alter ego. The fact that Plaintiff released a part of the escrowed stock and did so by a document which declares Owanah's ownership of that stock is inconsistent with her present claims that no accounting had been furnished and that no Owanah exists. The release and Receipt confirm not only that the parties negotiated their settlement with an underlying understanding that there is an Owanah whose property is to be differentiated from Defendant's, but also that the whole point of accounting was to make such differentiation.

Estoppel arises here, however, not only from Plaintiff's affirmative act acknowledging that an accounting

has been made, that escrowed stock should be released on the basis of that accounting, and that Owanah has independent existence, it also arises from Plaintiff's silence for two years when she must be presumed to have known that Defendant, as Owanah's president, would be using Owanah's assets in the conduct of Owanah's business unless Plaintiff asserted her ownership. She said nothing to Defendant or, so far as the record shows, to the Bank about any claim of right to pledged stock which survived Defendant's accounting. On the evidence, she cannot deny that she knew about the stock in Bank custody. The Agreement speaks about pledged property, and Defendant's testimony that he told Mr. Landis about the pledged stock is undisputed.

On the legal implications of silence, the authors of American Jurisprudence say this:

> Estoppel by silence or inaction is often referred to as estoppel by "standing by", and that phrase in this connection has almost lost its primary significance of actual presence or participaton in the transaction and generally covers any silence where there are knowledge and a duty to make a disclosure. The principle underlying such estoppels is embodied in the maxim "one who is silent when he ought to speak will not be heard to speak when he ought to be silent." Silence, when there is a duty to speak, is deemed equivalent to concealment. Moreover, there are cases where the mere silence of the estopped party and his failure to assert the right later claimed will be construed as a representation that he does not have the rights which he later attempts to assert. 28 AmJur 2d 666 Estoppel and Waiver §53

Defendant's Reliance

There can be little question about Defendant's

reasonable reliance on the release of escrowed stock as an acknowledgement that Owanah owned it. That's exactly what the Receipt says. Had the certificates not been released, Owanah could not have sold the shares and used the proceeds in Carson Sink development. Defendant also reasonably interpreted Plaintiff's failure to object to his accounting, particularly when she released escrowed shares based upon it, as a concurrence in its identification of marital state. There is no contradiction in the record of Defendant's testimony that he made the accounting, made it within the year prescribed, and documented it as Mr. Landis asked. There is no suggestion in the record that Mr. Landis is unavailable to testify. Plaintiff's Exhibit 22 shows that Roe & Fowler took the Exhibit 8 Receipt. The record reveals no effort by Owanah or Defendant to dispose of any property until the accounting was made and its adequacy impliedly acknowledged. Only then did Owanah undertake to convert property into cash, and all the cash was deposited in Owanah's account and used for corporate purposes.

Finally, it is appropriate to comment on the significance of Plaintiff's intent when she released the stock and remained silent when she knew what property Defendant had identified as marital estate. It is not essential for invocation of the estoppel doctrine that the party sought to be estopped had an intent to deceive. It need only be true that the representation related to a fact which the party claiming estoppel might assume to be true and act on that assumption.

Kelly v Richards, 95 Utah 560, 83 P2d 731, 129 ALR 164, 1938.

Plaintiff impliedly represented that Defendant's accounting was satisfactory and that Owanah and Defendant have separate identities. Defendant relied on that representation in dealing, as Owanah's president, with property accounted for as Owanah's. If Plaintiff is allowed to repudicate her representation, Defendant will suffer injury in the amount of the judgment against him in this action.

It is not fair or even conscionable to permit Plaintiff to wait for more than two years after the accounting should have been and was made, see what disposition of property was made, and then decide whether to claim all that property as marital estate.

## POINT V

### THE ORDER REQUIRING DEFENDANT TO PAY PLAINTIFF AN AMOUNT REPRESENTING A PERCENTAGE OF THE PRICE FOR WHICH THE ANDERSON RANCH WAS SOLD IS WITHOUT SUPPORT IN THE FINDINGS, CONCLUSIONS, OR EVIDENCE.

The evidence that title to the Anderson Ranch was, at the time of the parties' divorce, vested in Royalty Investment Company is undisputed. Plaintiff presumably claims that Royalty held that title in some kind of trust capacity, and that the parties had a beneficial interest. When Royalty sold the Ranch, under Plaintiff's legal theory, Royalty had an obligation to distribute the proceeds to the cestuis and no authority to extend the trust by managing the sale proceeds for the cestuis. The trial court ordered Defendant to pay Plaintiff one-half the amount which it expressly or impliedly

found should have been distributed by Royalty to Owanah or Defendant.

That segment of the judgment is erroneous in these respects:

1. The basis for any claimed trust is not set out in the Complaint or any amendment to it.

2. There is no finding or conclusion which establishes the legal basis for any Royalty obligation to distibute to its shareholders the proceeds from any sales of its property.

3. The entity claimed to have violated the trust is not made a party to the suit.

4. The only evidence of beneficial interest held by the parties is Defendant's testimony that, because Owanah, R.J. Colman and M.C. Collins contributed money with which payments on the Ranch were made, they were entitled to 62 1/2% of the "stock" or "equity" in Royalty. The judgment, without evidentiary justification, assigns all of R.J. Colman's and M.C. Collins' interest to Owanah and consequently to Defendant.

5. While there <u>is</u> a finding that <u>Owanah</u> is Defendant's alter ego, there is <u>no</u> finding that <u>Royalty</u> is. There is merely a finding that Defendant "held title to 62 1/2% interest in the Ranch through Royalty Investment Company."

The trial court's ruling, carried to its logical extreme, sets a precedent which leads to absurdity. Plaintiff is entitled under the judgment to half of Owanah's stock in Royalty, and she retains her equity as a stockholder in any

property Royalty acquired with the proceeds of the Ranch sale. Nevertheless, said the trial court, every time Royalty sells an asset, Defendant must pay Plaintiff one half of 62 1/2% of the sales price. In every case, then, where stock is distributed in a divorce decree, the defendant may be ordered to pay the plaintiff some percentage of the price received by the stock issuer whenever the issuer sells any of its property.

## CONCLUSION

The judgment in this case effects a property distribution which could never have been in the parties' contemplation when they made the Agreement, and it distributes to Plaintiff property in which Owanah's investor stockholders have vastly stronger ownership equities than Plaintiff without affording them opportunity to protect themselves. On both procedural and substantive grounds, alter ego was improperly applied. The judgment should be reversed.

Respectfully submitted this 19th day of June, 1984.

Frank J. Allen
Attorney for Defendant-Appellant

## MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief to Mr. Michael N. Zundel, 340 E. 400 South, Salt Lake City, Utah 84111, attorney for Plaintiff-Respondent, this 19th day of June, 1984.